

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

ABRAHAM B. DIAZ, III,

Defendant.

NO. CR-05-6055-EFS

**ORDER RULING ON DEFENDANT'S
SEVERAL PRETRIAL MOTIONS**

On January 27, 2006, a pretrial conference was held in the above-captioned matter. Defendant Abraham Diaz was represented by Rebecca Pennell. James Hagarty appeared on behalf of the Government. During this conference, the parties conducted a evidentiary hearing in connection with Defendant's Motion to Suppress, during which sworn testimony was provided by Officer Thatsana. After reviewing the submitted materials, relevant authority, and considering the evidence presented by the parties, the Court is fully informed on the issues set forth in Defendants' pretrial motions. This Order serves to memorialize and supplement the rulings rendered by the Court on those motions during the pretrial hearing.

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I. Background¹

On October 23, 2005, Officers Thatsana and Lee were patrolling for vehicular noise disturbances in Pasco, Washington, with an instrument capable of measuring the distance between the officers and vehicles emitting noise. At approximately 5:43 p.m., the officers heard a loud booming noise, which they concluded was coming from a Nissan that had just passed their position 198 feet away. In response to this noise violation, Officer Thatsana pursued the Nissan in his police vehicle.

The Nissan, which was being driven by Defendant, was stopped by Officer Thatsana for violating Pasco City Ordinance 9.61.020(C)(12), which prohibits vehicular audio systems from projecting sound further than seventy-five feet from their vehicle. After stopping the Nissan, Officer Thatsana asked Defendant to produce his driver's license. Defendant told the officer he had left his license at home. The officer then asked Defendant to produce any form of photo identification. Defendant indicated he did not have photo identification with him. The officer then asked Defendant for proof of his vehicle's registration. Defendant stated the vehicle belonged to his wife and he did not know where the registration card was.

Officer Thatsana then asked Defendant to state his name. In response, Defendant told the officer his name was Climente Trevino.

¹ All facts contained in this Order are taken from testimony provided by Officer Thatsana during the January 27, 2006, evidentiary hearing and the police report prepared by Officer Thatsana following his arrest of Defendant on October 23, 2005. (Ct. Rec. 34-2.)

1 Officer Thatsana then asked Defendant to spell his name. According to
2 Officer Thatsana, Defendant then began spelling "Climente Trevino"
3 "slowly" and that it "appeared [Defendant] was thinking on how to spell
4 his name." Officer Thatsana noticed Defendant was holding what appeared
5 to be a man's wallet, which the officer then asked about. Defendant
6 informed the officer that the wallet belonged to his wife. Officer
7 Thatsana noticed the wallet contained what appeared to be photo
8 identification and social security cards. Officer Thatsana asked
9 Defendant to explain who the cards belonged to. Defendant reported that
10 the cards in the wallet were his brother's. Officer Thatsana then
11 returned to his police vehicle to contact dispatch for report on
12 "Climente Trevino."

13 While Officer Thatsana was away, at his vehicle, Officer Granger,
14 who had arrived after the initial stop, approached Defendant and asked
15 for his social security number. Defendant indicated he did not remember
16 what his social security number was. Officer Thatsana then returned and
17 asked whether he could look at the wallet Defendant had in his hand,
18 which Defendant consented to. As Officer Thatsana examined the wallet,
19 he noticed the identification card he had earlier seen was missing.
20 Officer Thatsana asked Defendant if he knew where the identification card
21 had gone and Defendant responded that he did not know. Officer Granger
22 then informed Officer Thatsana that Defendant had a tattoo of the word
23 "Diaz" on his forearm.

24 At this point, Officer Thatsana ordered Defendant out of his vehicle
25 and informed Defendant he was being detained. After Defendant was out
26 of his vehicle, Officer Thatsana told Defendant he was about to pat him

1 down and asked Defendant whether he had anything on him the officer
2 should be concerned about.² Defendant answered that he had a pipe in his
3 right front pants pocket, which he indicated was used to smoke marijuana.
4 Upon learning of the pipe, Officer Thatsana patted Defendant's right
5 front pants pocket, where he felt a hard object he believed was the pipe.
6 Thereafter, Officer Thatsana removed the pipe from Defendant's pocket and
7 placed Defendant under arrest, presumably for possession of drug
8 paraphernalia, but also potentially for driving a vehicle with no valid
9 operator's license.

10 Following the arrest, Defendant was put in Officer Thatsana's police
11 vehicle and a search was conducted of Defendant's Nissan. During the
12 vehicle search, a gun was found hidden in a door. Defendant is now
13 charged with being a felon in possession of a firearm in violation of 18
14 U.S.C. § 922(g) (1) based on the gun found during the above described stop
15 and search.

16 **II. Analysis**

17 Defendant moves the Court to suppress the gun found in his vehicle
18 subsequent to his arrest on two bases: (1) Officer Thatsana's pat down
19 of Defendant was unlawful and (2) there was no lawful basis to search
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22 ² Officer Thatsana testified he removed Defendant from the vehicle
23 with the intent of moving Defendant to the back of his police vehicle so
24 he could continue his investigation of Defendant's identity in a secure
25 and controlled environment. Officer Thatsana also testified he intended
26 to pat Defendant down as an additional officer safety precaution.

1 Defendant's entire vehicle incident to his arrest. These issues are
2 separately addressed below.

3 **A. Was Officer Thatsana's Frisk Unlawful?**³

4 "The Fourth Amendment prohibits 'unreasonable searches and seizures'
5 by the Government, and its protections extend to brief investigatory
6 stops of persons or vehicles that fall short of traditional arrest."
7 *United States v. Arvisu*, 534 U.S. 266, 273 (2002). When a law
8 enforcement officer has probable cause to believe a suspect has committed
9 a traffic infraction, that officer's stop and temporary detention of the
10 suspect's vehicle is reasonable under the Fourth Amendment, even if the
11 ultimate charge stemming from the stop is unrelated to the reasons for
12 the traffic stop. *Whren v. United States*, 517 U.S. 806, 818-19 (1996).

13 "Police officers are entitled to employ reasonable methods to
14 protect themselves and other in potentially dangerous situations." *United*
15 *States v. Willis*, 431 F.3d 709, 717 (2005) (quoting *Allen v. City of Los*
16 *Angeles*, 66 F.3d 1052, 1056-57 (9th Cir. 1995)). For this reason, law
17 enforcement officers may, "within reason, search the area and question
18 [the suspect] about weapons for their own safety." *Id.* Officer are also
19 permitted, as a matter of course, to order any driver and/or passenger,
20 who have been lawfully stopped, to exit their respective vehicles.
21 *Maryland v. Wilson*, 519 U.S. 408, 409 (1997) (citing *Pennsylvania v.*
22 *Mimms*, 434 U.S. 106 (1977)). In addition, officers may frisk "a driver

24 ³ Defendant does not dispute the lawfulness of Officer Thatsana's
25 traffic stop, which was based on the noise violation witnessed by
26 Officers Thatsana and Lee.

1 and any passengers upon reasonable suspicion that they may be armed and
2 dangerous." *Knowles v. Iowa*, 525 U.S. 113, 118 (1998) (citing *Terry v.*
3 *Ohio*, 392 U.S. 1 (1968)); *United States v. Thomas*, 863 F.2d 622, 628 (9th
4 Cir. 1988) ("The standard for justifying a frisk is whether a reasonably
5 prudent person in the circumstances would be warranted in the belief that
6 his or her safety or that of others was in danger.") In determining
7 whether an officer's pre-frisk suspicion is reasonable, "due weight must
8 be given, not to his inchoate and unparticularized suspicion or 'hunch,'
9 but to the specific reasonable inferences which he is entitled to draw
10 from the facts in light of his experience." *Terry*, 392 U.S. at 27.

11 In this case, Defendant argues Officer Thatsana's pat down was
12 unlawful because the officer had no reasonable suspicion to believe
13 Defendant was armed and dangerous. In support of this proposition,
14 Defendant points to Officer Thatsana's admittance that he had no reason
15 to believe Defendant was armed, dangerous, a flight risk, or under the
16 influence of drugs or alcohol. Defendant also stresses Officer Thatsana
17 admitted he did not witness Defendant make any threatening or furtive
18 moves or gestures that would suggest a threat of violence. Finally,
19 Defendant points to the innocuous nature of the underlying reason for the
20 stop - a noise violation - to further highlight Officer Thatsana lack of
21 a basis to suspect Defendant was armed and dangerous.

22 In opposition, the Government emphasizes the reasonableness of
23 Officer Thatsana's decision to remove Defendant from his vehicle and
24 conduct a weapons search in light of the misleading information Defendant
25 continued to provide regarding his identity. In general, according to
26 the Government, a decision to *not* pat down Defendant, a person Officer

1 Thatsana had (1) more than sufficient evidence to suspect was attempting
2 to hide his identify and (2) probable cause to arrest for operating a
3 motor vehicle without a valid driver's licence, would have been unwise
4 and unsafe and reasonably could have led to Officer Thatsana's injury.

5 After considering the parties' arguments and reviewing the evidence
6 as presented in the parties' briefs and during the evidentiary hearing,
7 the Court denies Defendant's Motion to Suppress, finding Officer
8 Thatsana's decision to initiate a *Terry* search was reasonably designed
9 to protect himself from a potentially dangerous situation and
10 consequently permitted under the Fourth Amendment. The Court bases its
11 ruling on the circumstances faced by Officer Thatsana prior to the
12 search. First, Officer Thatsana knew Defendant had just committed a
13 misdemeanor (driving with no valid operator's license). Second, Officer
14 Thatsana knew Defendant (1) claimed to not have any photo identification
15 on him, (2) claimed to not know his social security number, (3) claimed
16 to not know where to find the vehicle's registration materials, (4)
17 claimed to not know where the identification card, which had been in the
18 wallet he was holding, had gone, (5) spelled his alleged name slowly,
19 implying Defendant had not been asked to spell the name "Climente
20 Trevino" on many prior occasions, and (6) had the name "Diaz" tattooed
21 on his right forearm, suggesting Defendant's true name was Diaz and
22 therefore, reasonably concluded Defendant was attempting to conceal his
23 identity. These facts justified Defendant's prolonged detention and
24 Officer's Thatsana's continuing investigation, which rightfully included
25 Defendant's removal from his vehicle and the officer's questioning of
26

1 Defendant about weapons. *See Willis*, 431 F.3d at 717; *Wilson*, 519 U.S.
2 at 409.

3 Once Defendant was removed from the Nissan, Officer Thatsana was
4 authorized to use reasonable measures to ensure his safety as he
5 continued to investigate Defendant's identity. This included a pat down
6 of the Defendant, an individual Officer Thatsana knew had just committed
7 a misdemeanor and reasonably could have inferred was wanted on separate
8 charges or in connection with a criminal investigation based on his
9 refusal to provide information relating to his identify. Accordingly,
10 until Officer Thatsana was able to ascertain Defendant's true identity
11 and learn about his criminal history, he was entitled to ensure his
12 investigation was conducted in a secure environment in which he did not
13 have to fear Defendant would reach for a concealed weapon and jeopardize
14 the officer's safety. Thus, this portion of Defendant's Motion to
15 Suppress is denied.

16 **B. Was Officer Thatsana Entitled to Search Defendant's Vehicle?**

17 The Fourth Amendment permits the full search of the passenger
18 compartment of a vehicle incident to the driver's lawful arrest. *New York*
19 *v. Belton*, 453 U.S. 454 (1981). Here, because Defendant was lawfully
20 arrested, Officer Thatsana was authorized to search the Nissan's
21 passenger compartment incident to that arrest. For this reason, the
22 remainder of Defendant's Motion to Suppress is denied.

23 Accordingly, **IT IS HEREBY ORDERED:**

- 24 1. Defendant's Motion to Suppress (**Ct. Rec. 33**) is **DENIED**.
25 2. Defendant's Motion to Dismiss (**Ct. Rec. 30**) is **DENIED**. *See*
26 *United States v. Murillo*, 422 F.3d 1152 (9th Cir. 2005).

DATED this 31st day of January, 2006.

S/ Edward F. Shea
EDWARD F. SHEA
United States District Judge